Supreme Court, U.S.
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No. 94-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

1. Respondent's contention that there is no conflict among the circuits is untenable. Since the filing of the Petition, the Fourth Circuit has explicitly recognized the existence of a conflict. In *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, No. 94-1617, 1995 WL 230507 (4th Cir. April 19, 1995), the Fourth Circuit joined several other circuits in addressing the question presented by the Petition — whether a losing party may appeal from the denial of summary judgment on a question of law without also raising the legal issue in a Rule 50 motion.

Before trial, Stone & Webster asked the district court "to rule as a matter of law that the rights and liabilities of the parties were governed by" an "Engineering Contract" between the parties and not by a "Purchase Order." *Id.* at *1. That motion was denied by the district court, and not renewed at trial. *Id.* at *4. The case proceeded to a jury trial, and Stone & Webster was ultimately found liable for breach of contract on the purchase order. *Id.* at *5. On appeal, Stone & Webster argued that the Engineering Contract governed as a matter of law. On the procedural issue it urged that "summary judgment denials of . . . discrete legal issues are and should be reviewable after trial, especially because such issues cannot support a judgment as a matter of law dismissing the opponent's entire claim." *Id.* at *6.

The Fourth Circuit surveyed the law in the several circuits, and noted that although the majority of the circuits, including the First Circuit, "have recently adopted the rule that the denial of summary judgment is not reviewable on appeal after a full trial and final judgment on the merits of the case," *id.* at *5, the Eleventh Circuit had adopted the rule that a law-based summary judgment motion *could* be appealed. *Id.* at *5, *8 & n.11 (discussing *Holley v. Northrop Worldwide Aircraft Serv., Inc.*, 835 F.2d 1375 (11th Cir. 1988)).[1] The Fourth Circuit expressly

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[1] The Fourth Circuit also discussed, and dismissed offhand, several of its own prior cases (*Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 596-97 (4th Cir. 1985), *amended on other grounds*, 788 F.2d 1042 (4th Cir. 1986); *Orlandi v. Goodell*, 760 F.2d 78, 80-82 (4th Cir. 1985); and *Smith v. University of N.C.*, 632 F.2d 316, 338 (4th Cir. 1980)), where the Fourth Circuit had reviewed denied, law-based summary judgment

"decline[d] to follow" *Holley* in favor of a blanket requirement that all summary judgment motions must be preserved by Rule 50 motions. 1995 WL 230507, at *6 n.8, *8.

The Fifth Circuit also agrees that its approach conflicts with that of the Eleventh Circuit. *Black v. J.I. Case Co.*, 22 F.3d 568, 571 & n.5 (5th Cir.), *cert. denied*, 115 S. Ct. 579 (1994).

2. While the Fourth Circuit did not recognize the existence of a conflict between the decision below and the Seventh and Second Circuits, the conflict with those circuits is equally clear.[2]

a. Respondent claims that the Seventh Circuit's decision in *Trustees of Indiana University v. Aetna Casualty and Surety Co.*, 920 F.2d 429 (7th Cir. 1990) does not conflict with the First Circuit's decision, because *Trustees* was "disavowed" by *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994), a case involving a litigant's effort to rely on the pretrial record and resurrect a fact-based summary judgment motion after an adverse verdict. *Watson* did not say that *Trustees* was wrongly decided in any respect. Respondent misreads *Watson*, which said only that *Trustees* did not "suggest[] that a denial of summary judgment may *always* be reviewed after a trial," *id.* at 278 (emphasis added).

Watson noted that in circumstances such as those in *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), post-trial review would be appropriate where the denial of summary judgment "had the effect of ending any consideration of the claim[s] in [the] district court." *Id.* at 353 n.55. As Sherwin-Williams showed in the Petition (p.18), this is precisely what occurred here: The district court's summary judgment ruling,

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motions after a full trial. *See Chesapeake Paper Prods.*, 1995 WL 230507, at *5. The court declined to follow the approach taken in these cases because "these opinions did not address the issue" of whether the denial should be reviewed at all. *Id.*

[2] The Fourth Circuit in *Chesapeake Paper Products* assumed that the Seventh Circuit's rule supported its decision, but, as shown *infra*, the Seventh Circuit would plainly reach a different result.

that the New Hampshire Consumer Protection Act applied to commercial transactions between two businesses as a matter of law, became the law of the case (6 *Moore's Federal Practice* ¶ 56.20[3.-4], at 56-703 (1995)), and Rule 56(d) required any subsequent trial to "be conducted accordingly." The district court's order effectively ended any further consideration of Sherwin-Williams' argument in the district court. Plainly the Seventh Circuit would reach a different result than did the First Circuit.

b. Respondent also claims that there is no conflict with the Second Circuit's decision in *Savarin Corp. v. National Bank of Pakistan*, 447 F.2d 727 (2d Cir. 1971), because the Second Circuit did not first discuss whether a denied summary judgment motion could be appealed after a trial on the merits. While the Second Circuit's decision in *Savarin* did not explicitly discuss the appealability of such denied motions, it is clear — and undisputed by Respondent — that the Second Circuit in *Savarin* perceived no prudential or jurisprudential impediment to reviewing denied, law-based summary judgment motions.[3]

3. Indeed, as Judge Aldisert has noted, a principal reason for a rule requiring errors to be "preserved" for appeal is the pragmatic, prudential reason that an appellate court should have a "fully developed record for review." *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983). That is the reason for the sensible rule that a party, having lost after a full-dress trial, may not argue on appeal that at some point in time prior to trial there were no genuine issues of material fact. *E.g.*,

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[3] Respondent similarly attempts to discard other cases cited in the Petition (*e.g.*, Judge Kozinski's opinion in *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366 (9th Cir. 1990)) on the ground (Opp. 12) that the issue of reviewability "was never specifically raised or addressed." However, cases such as *Wilson Arlington* illustrate that other courts have routinely assumed that legal questions raised in summary judgment motions need not be renewed in a Rule 50 motion.

Watson, 29 F.3d at 277. But "preserving" a legal question by making a JMOL motion under Rule 50 is a wholly superfluous requirement that the movant make a motion for reconsideration before obtaining appellate review on a legal question, a requirement unparalleled in any other area of federal procedure.[4]

4. Sherwin-Williams showed in the Petition (Pet. 8) that appellate review of a state-law question for "manifest error," or plain error, involves giving substantial deference to the lower court's construction of the state statute. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943). Respondent does not address these cases. Rather, Respondent seems to suggest (Opp. 2, 13-18) that even though the First Circuit found Sherwin-Williams' argument to be waived (App. 4a-5a), and announced that it would only apply "manifest error" review (App. 5a), it somehow "performed a thorough *de novo* review" of the state-law issue. (Respondent concedes (Opp. 17) that if the First Circuit had found waiver and engaged in "plain error" review, "then perhaps Sherwin-Williams might have a legitimate dispute.")

There can be no serious dispute that the First Circuit found this issue to have been waived. App. 4a ("The Appellant has failed to preserve this point for review on appeal"); App. 5a (the district court's ruling "is not available for review on this appeal"). Having found waiver, the First Circuit reviewed only for "manifest error." App. 5a; *see also* App. 11a. Importantly, the First Circuit never held that the district court's ruling was legally

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[4] By the same token, it bears repeating that Respondent never argued to the First Circuit that a Rule 50 motion was necessary to preserve appellate review. *See* Pet. at 6-7. Respondent's belated suggestion (Opp. 3), that "all counsel should well know that in order to preserve legal challenges to the judgment on appeal, motions under Rule 50 should be filed," rings particularly hollow — even Respondent's own counsel did not "well know" this supposed requirement of a Rule 50 motion, which is nowhere found or even suggested in any of the Federal Rules. *See* Pet. 16, 17.

correct; it held only that "there is ample basis for the trial judge's determination," a conclusion which applies exactly the standard for "plain error" review, not "*de novo*" review. App. 10a.[5]

Respondent's argument that the Petitioner has suffered no prejudice also ignores the relief that Sherwin-Williams sought from the First Circuit — certification of this important state-law issue of first impression to the New Hampshire Supreme Court. Were this case remanded to the First Circuit for the appropriate *de novo* review, it could — and should — thereupon certify this issue to the New Hampshire Supreme Court for a definitive resolution of this unsettled question of state law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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[5] In this light, the First Circuit's reference to "de novo" review, App. 5a, can only be understood as a statement of the general rule that absent waiver, an "issue of law" is ordinarily reviewed *de novo* on appeal.